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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6848

JOHN LEE BOWEN,

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

MICHAEL D. NASATIR, of
Nasatir, Sherman & Hirsch
8383 Wilshire Boulevard, #510
Beverly Hills, CA 90211
(213) 653-3303

JERALD W. NEWTON, of
Newton, Re & Russell
8383 Wilshire Boulevard, #510
Beverly Hills, CA 90211
(213) 655-5011

Attorneys for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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REPLY BRIEF FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the search of JOHN LEE BOWEN'S camper without warrant or probable cause at a fixed checkpoint approximately 50 road miles from the international boundaries of the United States, at a point conceded not to be the functional equivalent of the international border, is unconstitutional?

2. Whether there is an area equivalent of probable cause at the Highway 86 traffic checkpoint justifying the searching of vehicles passing through this location for illegal aliens without prior judicial approval?

3. Whether JOHN LEE BOWEN is entitled to the benefit of the decision holding searches at traffic checkpoints not located at the functional equivalent of the border without probable cause or warrant to be unconstitutional?

ARGUMENT

I.

THE SEARCH OF JOHN LEE BOWEN'S CAMPER WITHOUT WARRANT OR PROBABLE CAUSE AT A FIXED CHECKPOINT APPROXIMATELY 50 ROAD MILES FROM THE INTERNATIONAL BOUNDARIES OF THE UNITED STATES, AT A POINT CONCEDED NOT TO BE THE FUNCTIONAL EQUIVALENT OF THE INTERNATIONAL BORDER, IS UNCONSTITUTIONAL.

In *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), Part I, the Court, in an *en banc* decision, determined that the fixed checkpoint on Highway 86 was not the functional equivalent of the United States international border. For this reason, searches at this checkpoint cannot be considered "border searches" dispensing with the probable cause and warrant

standards of the Fourth Amendment.[1] *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S.Ct. 2533, 2539 (1973); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 285 (1925). Respondent, in its brief, concedes that the search at the Highway 86 checkpoint was not the functional equivalent of a border search. Res. Br. 10.[2]

A. No Warrant was Issued by a Qualified Magistrate for the Search of Petitioner Bowen's Vehicle; Therefore, the Burden Rests Upon the Government to Justify the Search.

It has long been held that the "warrant clause" of the Fourth Amendment is to be read in conjunction with the "unreasonable search and seizure" clause when Fourth Amendment rights are alleged to have been violated. *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 2136 (1972). The absence of a warrant makes the search "*per se* unreasonable." *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 514 (1967). The burden is on those seeking an exception for the warrant requirement to show the need for said exception. *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 95 (1951); *McDonald v. United States*, 335

[1] Respondent raises the question of the validity of the search of Mr. Bowen's camper in this Court, even though it did not file a cross-petition for a writ of certiorari. For this reason Petitioner Bowen is now compelled to argue the merits of the underlying search even though certiorari was granted solely on the question of retroactivity of *United States v. Bowen, supra.*

[2] Res.Br. will be used here, and hereafter, to refer to Respondent's Brief in *Bowen v. United States*, 73-6848.

U.S. 451, 69 S.Ct. 191, 193 (1948). As it is conceded that the instant search was without warrant, Respondent has the burden of justifying the instant stop, search, seizure and arrest of Petitioner Bowen. App. 35-56.[3] Under existing Fourth Amendment law, a vehicle can be searched *in some instances without a warrant but, in all cases, the search must be made upon probable cause*. This Court has repeatedly warned that the word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. *Coolidge v. New Hampshire*, 403 U.S. 444, 91 S.Ct. 2022, 2035 (1971). A person has an expectation of privacy in an automobile and an invasion of this privacy can only be justified if the Fourth Amendment is complied with. *Almeida-Sanchez v. United States, supra, Katz v. United States, supra.*

B. The Search of Petitioner Bowen's Vehicle at the Highway 86 Checkpoint was Conducted Without Probable Cause.

When Petitioner Bowen approached the Highway 86 checkpoint, his vehicle was stopped and he was questioned by border patrol agent Ortmeier as to his (Bowen's) citizenship. After Ortmeier ascertained that Bowen was in fact an American citizen, he (Ortmeier) ordered Bowen to open the back of the camper. App. 35. After the camper door was opened, Ortmeier allegedly detected the odor of marijuana and he ultimately discovered marijuana inside the camper. App.

[3] App. will be used here, and hereafter, to refer to the Appendix in *Bowen v. United States.*

36. No reasons justifying the opening of the camper door were given other than the fact that Agent Ortmeier desired to look in the back of the camper. Respondent apparently concedes that there was no "traditional probable cause" to search the back of the camper at this time. Res. Br. 5; Pet. Br. O. 18.[4] This Court has refused to justify the search of an interior of a vehicle, whether the vehicle is immobile or mobile, without probable cause in *all* of its past decisions. *Almeida-Sanchez v. United States, supra, Coolidge v. New Hampshire, supra; Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970); *Dyke v. Taylor Implement Co.*, 391 U.S. 216, 88 S.Ct. 1472 (1968); *Brinegar v. United States*, 338 U.S. 160, 69 S.Ct. 1302 (1949); *Husty v. United States*, 282 U.S. 694, 51 S.Ct. 240 (1931); and *Carroll v. United States, supra*. Pet. Br. 6-10.[5] Under the accepted, traditional concept of probable cause, it is clear that the instant stopping of Petitioner Bowen's vehicle and the search of the rear camper was unconstitutional.

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[4]Pet. Br. O. refers to Petitioner's Brief in *United States v. Ortiz*. This brief was incorporated by reference by Respondent in its brief in *Bowen v. United States*, Res. Br. 10. Petitioner Bowen therefore assumes that the disclaimer of particularized probable cause by petitioners in *Ortiz*, likewise applies to Respondents in the instant case.

[5]Pet. Br. will be used here, and hereafter, to refer to Petitioner's Brief in Bowen.

II.

RESPONDENT INCORRECTLY ASSERTS THAT THE SEARCH OF PETITIONER'S VEHICLE FOR ALIENS CONDUCTED AT A FIXED IMMIGRATION TRAFFIC CHECK-POINT, WAS REASONABLE UNDER THE FOURTH AMENDMENT NOTWITH-STANDING THE ABSENCE OF A WARRANT AND PARTICULARIZED PROB-ABLE CAUSE FOR THE SEARCHED VEHICLE.

Recognizing that the search and subsequent arrest of Petitioner Bowen in the instant cause were without warrant and probable cause and that under traditional Fourth Amendment law the arrest and search would fail, Respondent asserts that there is an areawide equivalent for probable cause for vehicle searches at the Highway 86 checkpoint involved herein, and at the other highway checkpoints located in the southwestern United States, and that these checkpoints should be allowed to operate *without* prior judicial approval or guidance. Petitioner relies upon the record in *United States v. Baca, et al.*, 368 F Supp. 398 (S.D. Cal. 1973), and the opinion filed therein on December 11, 1973.[6]

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[6] Petitioner Bowen joins Respondent Ortiz and objects to the conclusions reached by Judge Turentine in his opinion. Res. Br. O. 3. (Res. Br. O. will be used here, and hereafter, to refer to Respondent's Brief in *Ortiz*.) Bowen will make reference to the testimony and exhibits in *Baca, supra*, but Petitioner does not waive the substantive errors and limitations of the *Baca* hearing.

In reviewing the Government's attempt to create a new exception to the warrant requirement and to redefine the meaning of probable cause as it is understood in traditional Fourth Amendment discussions, this Court should consider the enlightening language of *Boyd v. United States*, 116 U.S. 616, 6 S.Ct. 524 (1886):

> "Though the proceeding in question is divested of any of the aggravating incidents of actual search and seizure, yet, as beforesaid, it contains there substance and essence, and affects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. *This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed." (Emphasis added.) 6 S.Ct. at 535.*

A. There is No Areawide Equivalent of Probable Cause at Highway 86 Where Petitioner Bowen Was Searched or at Other Fixed Checkpoints in the Southwestern United States.

Respondent argues with a great deal of vigor that there is an "areawide equivalent of probable cause for the limited vehicle searches conducted at fixed checkpoints." Pet. Br. O. 17-21. Respondent points out that the District Court in *Baca, supra*, found that there were from 800,000 to 1,000,000 illegal aliens in the United States and approximately 85% of these aliens are generally thought to be citizens of Mexico. Pet. Br.

O. 21. Mr. Justice Powell, in his concurring opinion in *Almeida-Sanchez, supra*, stated that there was a high concentration of illegal aliens in the Mexican border area both in absolute terms and in proportionate number to those persons legally present. The testimony at the *Baca, supra*, hearing indicated that the El Centro sector border patrol office apprehended 12,028 deportable aliens in 1970; 14,292 deportable aliens in 1971; 15,327 deportable aliens in 1972; and 23,125 deportable aliens in 1973. BT 310.[7]

The traffic checkpoints in this sector were responsible, in 1973, for apprehending 3,825 aliens. BT 360. Under the Immigration and Naturalization Service's[8] own figures, only 16-1/2% of the aliens seized in 1973 were seized at traffic checkpoints. In the same year, 2,988 illegal aliens were turned over to the I.N.S. by other law enforcement agencies. BT 362. This constituted approximately 13% of the illegal aliens apprehended in the El Centro sector in 1973. At the *Baca, supra*, hearing there was no testimony as to how many automobiles passed through the traffic checkpoints in one year, nor was there testimony as to how many vehicles were actually stopped or searched. Henry C. Felchlin, the chief patrol agent of the El Centro sector, testified that the primary means of apprehending illegal aliens is the "line watch" at the international border itself. The El Centro sector covers approximately 70 to 75 miles of the international border, and Mr. Felchlin has 140 agents under his control to watch this

[7]BT will be used here, and hereafter, to refer to Baca Transcript.

[8]From here after the Immigration and Naturalization Service will be referred to as the I.N.S.

area. BT 310. Only five miles of this 75 mile area is fenced and there is a lack of scientific equipment to help apprehend illegal aliens at the border itself. BT 313, 364. Mr. Felchlin testified that the "line watch" itself is not the best available and that it is in fact inadequate because Mr. Felchlin does not have enough manpower to watch the international border. BT 363. Felchlin has asked for approximately 50 new men each year for the past three years yet he has not received any of the requested manpower. BT 365.

Felchlin testified that the checkpoint on Highway 86 was opened approximately 6,000 hours in 1973, or about 70% of the time. BT 228. To reach the checkpoint at Highway 86, a person coming from the south would cross Interstate 80 and travel through several cities before he arrived at the checkpoint. BT 329. Approximately 75% of the vehicles passing through the checkpoint are stopped for questioning and approximately 10% to 15% of the vehicles are searched.[9] BT 331, 333. A review of these figures indicates that most of the seized aliens were apprehended while attempting to cross the border. This is true even though only approximately 50% of the men available to Felchlin were stationed on the "line watch." BT 357.

Without actual figures as to how many cars pass through the Highway 86 checkpoint, and how many of these cars are stopped and how many cars are actually searched, it is impossible to accurately determine the

[9] Felchlin was allowed to testify, over objection, that he believed that over half of the vehicles reaching this checkpoint have come directly from Mexicali, B.C., Mexico. No foundation for this "opinion" was established and, in fact, Felchlin admitted there were no statistics available on this point.

effectiveness or reasonableness of the Highway 86 checkpoint. However, in Petitioner's Brief in *Ortiz* it is alleged that 12,000 deportable aliens were apprehended at the San Clemente checkpoint in 1973. Pet. Br. O. 31. In 1973 at San Clemente, 2.3 million vehicles were stopped for brief questioning and 320,000 vehicles were subjected to physical search. BT 28, 31. Using the border patrol's own figures at the San Clemente checkpoint, well over 99% of the time they did *not* find aliens when vehicles were stopped, and over 96% of the time they did *not* find aliens when vehicles were searched.[10] If one assumes that the San Clemente figures are an accurate representation of the entire checkpoint system, it would seem obvious that the stopping and searching of vehicles is not based upon probable cause, whether probable cause is defined traditionally or whether the Government's so called "area equivalent of probable cause" is used. In fact, it would seem that an areawide equivalency of probable cause to believe that the vehicles do *not* contain aliens exists as to at least the San Clemente checkpoint.

The concept of an area functional equivalent for probable cause was developed by the Government to apply *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727 (1967), to traffic checkpoint searches for aliens. The Government argues that *Camara, supra,* allows probable cause to be determined on an "area as a whole" rather than upon a "specific dwelling." Pet. Br. O. 19.

[10]These percentages are based on the assumption that there was only one alien found in each searched vehicle. If, in fact, some vehicles contained more than one alien, the percentage of cars stopped and searched without finding aliens would, of course, increase.

Respondent's reliance on *Camara, supra*, to justify the instant search is clearly misplaced. *Camara* and its companion case, *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1731 (1967), dealt with Health and Fire Department inspections. The necessity for these types of inspections on an areawide basis may be provided by the general exterior appearance of the building in the area. Inspections might also be based upon the age of the respective dwelling if some correlation between age of dwelling and disease or fire hazard could be drawn. Thus, in health and fire inspections there exists some exterior criteria which an inspector could point to in trying to establish areawide probable cause to a magistrate to justify the search of a particular dwelling of the area.

This analogy breaks down when it is applied to the traffic checkpoints in the southwestern United States. First, there is no exterior appearance of a vehicle which would reasonably lead a magistrate to determine that it contained aliens. Support for this proposition is found on the previous quoted statistics where over 99% of the vehicles stopped and over 96% of the vehicles searched at San Clemente revealed no illegal aliens. Second, the age of the vehicle certainly has little bearing on whether it will be used to smuggle aliens or not. Third, the high proportion of Mexican-American citizens in the area would not lead a reasonable man to believe that a vehicle driven by a Mexican-American was being driven by an alien. In fact, a determination to stop or search a vehicle solely on the racial characteristics of the driver raises serious equal protection problems. Res. Br. 0. 37.

In *Camara, supra*, the criteria for determining whether "area probable cause" was established as follows:

"First, such programs have a long history of judicial and public acceptance. (Citation omitted) Second, the public interest demands that all dangerous conditions be prevented or abated, *yet it is doubtful that any other canvassing technique would achieve acceptable results.* Any such conditions—faulty wiring is an obvious example—are not observable from outside the building and indeed may not be apparent to the inexpert occupant himself. Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involved a relatively limited invasion of the urban citizen's privacy." (Emphasis added.) 86 S.Ct. at 1735.

Application of these standards to Petitioner Bowen establishes the unreasonableness of the instant stop and search. Under the first criteria mentioned in *Camara, supra, this* court has never sanctioned a checkpoint search away from the functional equivalent of the border. When the second criteria is considered, it is clear that there are numerous other techniques available to prohibit the illegal entry of aliens into the United States. The entire area of the border could be fenced as requested by chief patrol agent Felchlin. BT 370. The "line watch" is not adequate at the present time because of lack of manpower; thus, an increase of manpower, or a reutilization at the border itself of manpower presently stationed inland would result in the apprehension of more aliens. Increase in equipment such as airplanes, radar, star scopes, etc., would increase the effectiveness of a border patrol at the line watch. Third, the removal of the incentive for aliens to illegaly enter the United States by making it a crime for an employee to intentionally employ an illegal alien would perhaps be the best measure of all to curb illegal entry.

Finally, the instant searches are aimed at the discovery of evidence of a crime and they intrude upon an urban citizen's reasonable expectation of privacy. While the alien himself may not be prosecuted unless he is a repeated offender, the driver or "smuggler" operating the vehicle is a subject of prosecution. Border patrol officers are, on occasion, accompanied by other federal officers with other law enforcement duties. I.N.S. agents receive training in the detection of contraband by the United States customs officials. In fact, the I.N.S. checkpoints are provided information about suspected narcotics traffic, bank robbers, murder suspects, etc. BT 375. When agent Felchlin was asked what would happen if a stopped citizen stated that he was a United States citizen but that he did not want to talk to agents any more, Felchlin replied that *this citizen would be referred to a highway patrolman who is generally present at the checkpoint and the patrolman would then check the individual's driver's license and identification, and it is possible that an NCIC "state want" would be "run" on the individual.* BT 383, 384. In fact it is not unusual for border patrolmen to disregard their stated objective of searching for illegal aliens and to search the operators and occupants of vehicles for contraband.[11]

[11] *United States v. Lujan-Romero*, 469 F.2d 683 (9th Cir. 1972), search of footlocker; *Valenzuela-Garcia v. United States*, 429 F.2d 1170 (9th Cir. 1970), search of 6-8 inch compartment in car; *Roa-Rodriguez v. United States*, 410 F.2d 1206 (9th Cir. 1969), search of jacket; *United States v. Winer*, 294 F. Supp. 731 (W.D. Texas 1969), search under seat of a small automobile; and *United States v. Hortze*, 179 F.Supp. 913 (S.D. Cal. 1959), search of a package of cigarettes.

Justice Powell, in his concurring opinion in *Almeida-Sanchez, supra*, delineated a four-pronged test to determine whether probable cause existed to stop and search vehicles. This test was ignored by Respondent in its brief for obvious reasons. The test is as follows:

> "(i) The frequency with which aliens illegally in the country are known or reasonably believed to be transported within a particular area; (ii) the proximity of the area in question to the border; (iii) The extensiveness and geographic characteristics of the area, including the roads therein and the extent of their use,[4] and (iv) The probable degree of interference of the rights of innocent persons, taking into account the scope of the proposed search, its duration, and the concentration of illegal alien traffic in relation to the general traffic of the road or area." 93 S.Ct. at 2545. (Footnote omitted)

Without adequate statistics, it is impossible to determine the frequency with which aliens illegally in the country are transported through the checkpoint at Highway 86 or other checkpoints in the El Centro sector. The statistics do indicate that 12,000 aliens were apprehended in 1973 at San Clemente and some 3,825 were taken into custody at *all* checkpoints in the El Centro sector border district, not just the Highway 86 checkpoint. The Highway 86 checkpoint is approximately 36 air miles or 50 land miles from the border. The geographic character of the area is generally desert. However, the checkpoint is north of Interstate 80, the major east-west thoroughfare across the southwestern United States. The checkpoint is also located in such a way that it is passed through by extensive numbers of hunters, dune buggy enthusiasts, fishermen, and vaca-

tioners. Finally, the checkpoint is also located *north* of several California cities. Thus, the innocent citizen traveling in the southwest is subject to having his privacy infringed on the whim of I.N.S. agents forcing him to open his trunk and remove his backseat.

The traffic checkpoints are capable of being easily circumvented by alien smugglers. All that an alien smuggler has to do to avoid apprehension at a traffic checkpoint is to stop his vehicle approximately one mile before the checkpoint, unload the aliens and have them sneak by the checkpoint through an overland route, return to the highway past the checkpoint, and be picked up again by the same vehicle. BT 392.

When all the above information is considered, it is obvious that there is not an area equivalent for probable cause at the Highway 86 checkpoint. Without this area equivalent of probable cause, the underlying search is, in fact, invalid whether it is conducted with or without a warrant. For this reason, the Court of Appeals for the Ninth Circuit was correct when it determined that the stop of Mr. Bowen's vehicle and the subsequent search was unconstitutional. *Bowen v. United States, supra*, Part I.

B. Assuming, Arguendo, That There is an Area Equivalence of Probable Cause at the Highway 86 Checkpoint, the Search Conducted at Said Checkpoint Without a Warrant was Invalid.

Respondent next argues that there is no need for a prior judicial determination of the validity of areawide probable cause at the checkpoints and therefore the

warrant requirement of the Fourth Amendment can be dispensed with. This argument flies in the face of all established decisions of this Court and has in fact been rejected by this Court on numerous occasions. *United States v. United States District Court, supra; Katz v. United States, supra; Camara v. Municipal Court, supra.* The reasons for rejecting this position were perhaps best put forth by this Court in *United States v. United States District Court, supra:*

> "We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in the domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of 'ordinary crime.' If the thread is too subtle or complex for senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance." 92 S.Ct. at 2138.

What the Government is urging, in effect, is that agents of the I.N.S. be permitted to operate checkpoints at locations which they, and only they, deem to be reasonable; during hours which they, and only they, wish to run them; and to conduct searches of vehicles that they, and only they, decide to search. All of this this Court is to accept without *any* predetermined regulations or restraints controlling the conduct of the I.N.S. agent. In fact, during the *Baca* hearings it was admitted that there were no guidelines for the socalled "point man" to determine which vehicles passing through a checkpoint should be allowed to pass, which should be stopped, and which should be searched. BT 291

Placing this discretion solely in the hands of an I.N.S. agent without any restraint from the Court would be to depart from well established constitutional principles. These principles were articulated in *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367 (1948), in this manner:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.[3] Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officer's making a search without a warrant would reduce the Amendment to a nullity and leave the people's home secure only in the discretion of police officers.[4] . . .No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the constitutional requirement." 68 S.Ct. at 369. (Footnotes omitted)

The view that the executive should not be trusted to exercise the judicial function was reiterated in *McDonald v. United States, supra*, where the Court states:

> "We are not dealing with formalities. The presence of the search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate

between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right to privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted." 69 S.Ct. at 193.

This point was also discussed by this Court in *United States v. United States District Court, supra:*

"Those Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillance may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. (Citation omitted) But those charged with this investigation and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their task. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.[17]" (Footnote omitted) 92 S.Ct. at 2136, 2137.

The Government argues that the conditions at fixed checkpoints are stable and that the same conditions justifying a search on one day will also apply three days later; therefore, adjudication of Fourth Amendment rights *after* the search will serve to safeguard the privacy protected by the Fourth Amendment. This

argument is falacious in numerous respects. The argument presupposes that in fact the conditions at a checkpoint do not vary from time to time. This conclusion is in direct contradiction to the testimony adduced at the *Baca* hearings. In *Baca*, agent Felchlin testified that certain checkpoints which were temporary in nature would be operated only if information was received that aliens were coming their way. BT 328. Surely, in this situation, the judgment as to whether the checkpoint should be operated and, if it were operated, under what conditions it were to be operated, could just as well be made by a neutral and detached magistrate as by an I.N.S. agent. Next, the *Baca* hearings indicate that during certain periods of the year there are seasonal activities which affect the flow of traffic and which would decrease the possibility of aliens being in each vehicle which passes through the checkpoint. Primarily these activities include hunting and fishing season, winter recreational vehicles, and vacation travel. BT 388. It is inconceivable that a magistrate would not take these seasonal variations in traffic into account when he determined whether a warrant would be issued. One of the primary reasons aliens illegally enter the United States is to find employment to improve their standard of living. A great deal of the employment obtained by the illegal alien is the harvesting of field produce. It would certainly bear on a magistrate's determination as to whether a warrant should be issued for a checkpoint if harvesting season was or was not in session and whether there was a great demand for field hands.

Another important factor to determine whether highway checkpoints should be authorized to operate under warrant would be the weather conditions in the

immediate area. If the statistics show that aliens illegally entered the United States on a much larger scale when there was no moon, it might be reasonable to authorize checkpoint stops during the period of the dark of the moon and not at other times; it could also be determined whether a checkpoint should be opened or not during inclement weather.

Finally, if information were received that numerous aliens had penetrated the "line watch" and there was information to indicate that they were attempting to travel toward the interior of the United States, it might be an appropriate time for a magistrate to issue an order allowing a search at this time. It should be obvious from the foregoing that there are numerous instances when a magistrate's discretion could be brought into play to allow checkpoints to be operated at some times for some purposes while at other times the checkpoint would not be allowed to operate.

Not only are there numerous factors which should be considered as to whether a traffic checkpoint should be operating, but there are other factors to determine the scope of the inquiry or search which would be permitted at the checkpoint. It may well be that it would be reasonable for a magistrate to issue a warrant allowing a vehicle to be stopped for a quick exterior inspection but not to *carte blanche* allow searches of the vehicles. A search might then be authorized if, and only if, the officer could articulate reasons amounting to probable cause to believe that that particular vehicle contained illegal aliens. If, on the other hand, previous information had been obtained particularly describing certain vehicles with license plate numbers, etc., it may well be that a warrant could be issued to authorize the

stop and search of that vehicle. In any event, it would seem that a judicial officer would be better qualified to render this judicial decision than an immigration officer.

Another factor to be determined by the magistrate would be the physical location of the traffic checkpoints. At the present time checkpoints are located in positions which reflect the unfettered judgment of the I.N.S. that they are needed at the specific location. This determination flies in the face of the recent pronouncement of this Court in *Almeida-Sanchez v. United States, supra*, that searches such as the instant search are to be conducted at the functional equivalent of the border so that the vehicles searched for illegal aliens have a high probability of coming from the international border. Unless a checkpoint is located at the functional equivalent of the border a stop and search of the vehicle should be unconstitutional. This is particularly true when examining the checkpoint on Highway 86 because it is north of Interstate 8, the major east-west thoroughfare in the southwest. It is also located north of several California cities in the immediate area. For this reason it is clear that much traffic which is not "Border traffic" passes through this checkpoint.

Respondent's contention that a subsequent judicial hearing in the nature of a motion to suppress evidence in any criminal proceedings would be adequate to remedy the violation of the Fourth Amendment rights completely ignores the plight of the innocent motorist traveling across the southwestern United States on Interstate 80, who swings north on Highway 86, and is subjected to a vehicle search by an I.N.S. agent, without probable cause and without a warrant, and who finds nothing. This citizen has been delayed in his

journey, subjected to the degradation of being treated like a "common criminal" and he has little, if any, redress for the invasion of his privacy. Further, he has no meaningful way of knowing if the agent is operating under lawful authority or merely at his (the agent's) whim. This situation is not an unusual situation in light of the fact that over 99% of the stops at San Clemente produce no aliens and over 96% of the searches at San Clemente produce no aliens. It is exactly this situation which requires the insertion of the magistrate between the unfettered discretion of the officer in the field. This process of allowing subsequent authorization for searches or arrests was strongly criticized in *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223 (1964), where the Court stated:

> "An arrest without a warrant bypasses the safeguards provided by an objective pre-determination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." 85 S.Ct. at 228.

A careful reading of Respondent's brief indicates that their main reason for circumventing the judicial process in the determination of whether a search can take place is for the convenience of law enforcement. It was readily admitted by agent Felchlin, during the *Baca* hearing, that his agency would be much more effective if he were allocated 50 more men; if he had a 12-foot fence along the 75 miles of border section; if he was equipped with radar, and if he had better equipment for night watching. In effect, the Government in this case contends that because law enforcement could use

more personnel and technology, and this is not forthcoming, Fourth Amendment protections should be abridged in the name of law enforcement. This has never been a reason for abrogating the Fourth Amendment. In fact, this Court, itself, recognized this in *Almeida-Sanchez v. United States, supra*, where it stated:

> "The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards." 93 S.Ct. at 2540.

It is precisely for these reasons that, if this Court finds there is an areawide equivalency of probable cause to justify the traffic checkpoints, this Court should further require the protection of a warrant to properly curtail the discretion of I.N.S. agents in stopping and/or searching vehicles.

III.

JOHN LEE BOWEN SHOULD HAVE BEEN GIVEN THE BENEFIT OF THE DECISION IN *UNITED STATES V. BOWEN*, PART I.

Petitioner Bowen contends that this Court's decision in *Almeida-Sanchez, supra*, and the *en banc* decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Bowen, supra*, Part I, were clearly foreshadowed by previous decisions of this Court and, for this reason, the question of retroactivity does not arise and Petitioner Bowen himself is entitled

to the benefit of the existing case law. Pet. Br. 6-12. In deciding *Almeida-Sanchez v. United States, supra*, this Court concluded that *no* prior decision of this Court supported the Government's position in that case. The Government now argues that the Federal Courts of Appeal can disregard established law from the Supreme Court and through this course of conduct, establish a body of law justifying clearly unconstitutional conduct. In support of this premise, the Government argues that this Court did not grant certiorari to review these decisions of the Court of Appeals allowing alien checkpoint searches. Pet. Br. O. 48-49. In this regard, Respondent overlooks the established principle that denial of certiorari by the Supreme Court reflects no opinion on the merits of the underlying actions. *United States v. Kras*, 93 S.Ct. 631, 409 U.S. 434 (1973); *Griffin v. United States*, 69 S.Ct. 814, 336 U.S. 704 (1949).

Of necessity, Respondent relies upon the opinions of the Ninth Circuit Court of Appeals justifying traffic checkpoint searches which were clearly abhorrent to the Fourth Amendment. Pet. Br. O. 48. In attempting to justify this reliance, Respondent cites *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971). In *Huson*, the injured party filed a personal injury action against Chevron Oil Co. over one year after the date of the actual injury. At the time that the suit was filed, the suit was timely because it was felt that admiralty law, governed by the principle of laches, controlled the filing of the suit rather than Louisiana's one year statute of limitation. After the filing of the suit, this Court decided *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835 (1969). *Rodrigue, supra*,

dealt with the interpretation of Title 43 U.S.C. §1331, et seq. There were no prior Supreme Court decisions in this area to aid the lower courts in the statutory construction of this Act and therefore the Courts of Appeal necessarily rendered their decision of first impression without guidance from the Supreme Court. Taking this into consideration, the Court in *Huson, supra*, refused to make the rule of *Rodrigue, supra*, retroactive. This is an entirely different situation from the instant case. Here, the I.N.S. relies upon their own administrative regulation, Title 8 C.F.R. §287.1(a)(2), to justify alien searches at checkpoints concededly away from the functional equivalent of the border. Previous Supreme Court interpretations of administrative regulations have indicated that at the very least area probable cause and a warrant are required in this situation. *Camara v. Municipal Court, supra; See v. City of Seattle, supra.* There is also a long line of case law governing the search of moving automobiles which establishes that "particular" probable cause is required before a search is justified. In this instance, the Court of Appeals rejected established Supreme Court law in upholding the administrative regulations and Title 8 U.S.C. §1357. Thus, *Huson, supra*, is inapplicable to the instant situation.

Respondent agrees with Petitioner Bowen's contention that if *United States v. Bowen, supra*, Part I established "new law", Petitioner Bowen himself should get the benefit of this rule. However, Respondent bases this concession on policy reasons. While Mr. Bowen accepts this concession, he still believes that Article III, Section 2 of the Constitution dictates this result. As was said in *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969):

> "[B]ut, as we recently explained in *Stovall v. Denno*, 388 U.S. 293, 301, 87 S.Ct. 1967, 1972, 18 L.Ed.2d 1199, the fact that the parties involved in the decision are the only litigants so situated who receive the benefit of the new rule is 'an unavoidable consequence of the necessity that constitutional adjudications do not stand as mere dictum.' Whatever inequity may arguably result from applying the new rule to those 'chance beneficiaries' is 'an insignificant cost for adherence to sound principles of decision-making.' " 89 S.Ct. 1036 n. 24.

Respondent's reliance upon *Allen v. State Board of Education*, 393 U.S. 573, 89 S.Ct. 817 (1969); *England v. Louisiana Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461 (1964); and *James v. United States*, 366 U.S. 213, 81 S.Ct. 1052 (1961) is misplaced in that these decisions do not involve "constitutional adjudications." *Allen supra*, involved the interpretation of Title 42, U.S.C. §1973, et seq.; *England, supra*, involved the proper procedure to obtain a state decision of a federal claim; and *James, supra*, involved the statutory interpretation of Title 26, U.S.C. §145(b) and 7201. *United States v. Bowen*, Part I, involves "constitutional adjudication" as did *Desist, supra*, and *Stovall, supra.*[12]

Finally, assuming that *Almeida-Sanchez, supra*, made new law, Respondent contends that Petitioner Bowen should not get the benefit of the holding even though Mr. Bowen was on "direct appeal" at the time of this decision because of "policy reasons." Petitioner con-

[12] *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772 (1966) and *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965), indicating a contrary view was overruled by implication in *Desist, supra*, and *Stovall, supra.*

tends that in fact policy reasons require that *Almeida-Sanchez, supra*, be applied to him. Pet. Br. 20-26.

In Support of this position, Respondent relies upon *Michigan v. Payne*, 412 U.S. 47, 93 S.Ct. 1966 (1973); *Adams v. Illinois*, 405 U.S. 278, 92 S.Ct. 916 (1972); *Williams v. United States*, 401 U.S. 646, 91 S.Ct. 1148 (1971); *DeStefano v. Woods*, 392 U.S. 631, 88 S.Ct. 2093 (1968); and *Desist v. United States, supra*. All of these cases involve constitutional adjudications affecting local, state, and federal law enforcement and all those constitutional principles if applied retroactively, would cause a massive burden on local, state and federal courts.[13]

Petitioner's cause, on the other hand, involves a decision that generally only affects a few Federal Courts in the Fifth, Ninth and Tenth Circuits, and only one small federal law enforcement agency, the I.N.S. The effects of applying *Almeida-Sanchez, supra* to cases on direct appeal at the time of that decision on law enforcement and the courts would be minimal compared to the effect of making the decisions in *Payne, supra; Adams, supra; Williams, supra; DeStefano, supra,* and *Desist, supra*, retroactive.

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[13]*Payne, supra,* involved the retroactivity of the decision prohibiting increased sentence on retrial; *Adams, supra,* involved the retroactivity of required counsel at preliminary hearings; *Williams, supra*, involved the retroactivity of the scope of searches incident to arrest; *DeStefano, supra*, involved retroactivity of jury trials for certain offenses; and *Desist, supra* involved retroactivity of warrantless wiretaps.

CONCLUSION

Petitioner John Lee Bowen submits that the decision of the United States Court of Appeals for the Ninth Circuit in *United States v. Bowen*, Part I, was correct when it determined that a warrantless, probable causeless search of his vehicle at a fixed checkpoint not the functional equivalent of a border violated the Fourth Amendment to the United States Constitution. It is clear that this opinion of the Court of Appeals should have been applied to Petitioner Bowen himself because that decision either (1) was clearly foreshadowed by previous decisions of this Honorable Court; or (2) the decision of the Ninth Circuit overruled clear past precedents of that Circuit and therefore the opinion announced in *United States v. Bowen, supra*, was new law and Mr. Bowen himself should be given the benefit of that ruling. For this reason, the contraband seized from Mr. Bowen's camper must be suppressed from evidence and the matter remanded to the United States District Court for the Sourthern District of California to determine whether there is enough admissible evidence to proceed to trial against Mr. Bowen. Any other result would work an injustice upon Mr. Bowen who has continually

challenged the validity of the search and the admissibility of the seized contraband into evidence which was used to convict him.

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Respectfully submitted,

MICHAEL D. NASATIR, of
Nasatir, Sherman & Hirsch
8383 Wilshire Boulevard, #510
Beverly Hills, Ca 90211
(213) 653-3303

JERALD W. NEWTON, of
Newton, Re & Russell
8383 Wilshire Boulevard, #510
Beverly Hills, CA 90211
(213) 655-5011

Attorneys for Petitioner